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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
| 10/800,225 | 03/12/2004 | Valerie Kazich | VAK-P-03-001 | 8558 |
| 29013 | 7590 | 09/22/2008 | EXAMINER | |
| PATENTS+TMS, P.C. 2849 W. ARMITAGE AVE. CHICAGO, IL 60647 | | | WEINSTein, STEVEN L | |
| ART UNIT | PAPER NUMBER | | | |
| | 1794 | | | |
| MAIL DATE | DELIVERY MODE | | | |
| 09/22/2008 | PAPER | | | |

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/800,225

Filing Date: March 12, 2004

Appellant(s): KAZICH, VALERIE

Brian M. Mattson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 6/30/08 appealing from the Office action mailed 10/26/07

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

.(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

| | | |
|--------------|----------------------|---------|
| 2,803,550 | Ackalusky | 08-1957 |
| 2,735,778 | Taylor | 02-1956 |
| 2003/0087011 | Perkins | 05-2003 |
| 3,306,512 | Pagnini | 02-1967 |
| GB 2,293,751 | Blant (G. Britain) | 04-1996 |
| 4,938,411 | Rizzuto | 07-1990 |
| 2002/0029697 | Oshio | 03-2002 |
| 11-137179 | Suzuya Shokuin(Jap.) | 05-1999 |
| 5,770,250 | Smith | 06-1998 |
| 4,756,939 | Goodwin | 07-1988 |
| 4,321,997 | Miller | 03-1982 |
| 4,940,621 | Rhodes et al | 07-1990 |
| 4,865,855 | Hansen et al | 09-1989 |
| 6,457,585 | Huffer et al | 10-2002 |
| 4,336,664 | Penick et al | 06-1982 |
| 2,585,924 | Freedman et al | 02-1952 |
| 6,814,234 | Lipper | 11-2004 |
| 3,704,892 | Moravick et al | 12-1972 |
| 4,648,548 | Shin | 03-1987 |
| 6,746,743 | Knoerzer et al | 06-2004 |
| 3,835,564 | Gottschalk | 09-1974 |
| 3,100,642 | Goldstein | 08-1963 |

| | | |
|-----------|-----------------|---------|
| 5,676,401 | Witkowski et al | 10-1997 |
| 6,755,711 | McClung et al | 06-2004 |
| 2,711,541 | Bellett | 06-1955 |

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-20 are rejected under 35USC112, 1st para. for containing new matter.

The recitations, in claims 1,8, and 13, that the bottom or base is "rigid", appears to be New Matter, not supported by the specification. The word "rigid" is thought to be generally understood to mean not flexible or not bending. The specification and claims as originally filed does not use the word "rigid", nor is there any indication in the specification as to whether the bottom or base is inflexible or non-bending. The specification does disclose that the base may be made from cellulose fiber and/or plywood, plastic, etc. However, since there is no disclosure in the specification as to how thick these bases are, and since it is common knowledge that whether a material is flexible or not is a function of the thickness of the material, and even products such as plywood, if sufficiently thin is flexible, there is therefore no evidence that appellant has support for a rigid base, in the specification as originally filed. Also, the recitations, in claims 1,8, and 13, that the lip extends "above" the top layer or the absorbing means, also appears to be New Matter, not supported by the specification as originally filed.

The specification as originally filed does not use the word "above". The specification only discloses that the lip extends "outward" with respect to the top layer. "Outward" does not mean "above". The word "outward" in referring to the lip or rim of the base makes more sense in terms of the lip extending away from the base in a configuration that has the sloped or inclined away from the base and top layer. Since there is no other disclosure as to this configurational relationship, and since there is no cross-sectional view of the assembly, only an exploded view which is inconclusive at best, there is therefore no evidence that appellant has support for the word "above" in the specification as originally filed. Arguments to the effect that the fact the specification discloses pooled liquid does not drip out is support for the recitation that the lip is "above" the top layer is not convincing since an outwardly tapered lip would accomplish the same function.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3,8,13,17 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ackalusky (2,803,550) in view of Taylor (2,735,778) or vice versa, i.e., Taylor in view of Ackalusky, both further in view of Perkins (2003/0087011), Pagnini (3,306,512), Blant (GB2293751), Rizzuto (4,938,411), Oshio (2002/0029697), Suzuya Shokuhin (JP 11-137179), and Smith (5,770,250), essentially for the reasons fully and

clearly detailed in the Office action mailed 12/5/06, further in view of Goodwin (4,756,939), Miller (4,321,997), Rhodes et al (4,940,621), and Hansen et al (4,865,855).

In regard to claim 1, Ackalusky discloses it was well established in the art to provide an apparatus for collecting drips from a frozen treat, the apparatus comprising a base defined by a perimeter wherein the base has a center point and the perimeter is equidistant from the center point (Ackalusky disclosing square or round bases – col. 2, para. 4), and wherein the base has a top layer (24) covering a bottom layer (18) wherein the base is planar and the bottom layer is made from a material that is at least partially rigid, in that it is self-supporting and is made of some of the same materials disclosed by applicant (e.g., plastic and cardboard, molded wood pulp, etc.); and wherein the top layer is an absorbent material and the bottom layer extends to a point outside of the outer edge of the top layer without overlapping the top layer; said apparatus further comprising a lip (14) integrally formed on the perimeter of the base (actually, the bottom layer) wherein the lip extends to a point above the top layer and wherein the lip is perpendicular to the base, and a passage at the center point of the base, wherein the passage forms an opening (26) through the top layer of the base and an opening (20) in the bottom layer of the base. Taylor (Fig. 1), Pagnini (Fig. 2), Blant (Fig. 3), Rizzuto (Fig. 3), Oshio (Fig. 1), Suzuya Shokuhin (Fig. 3), and Smith (Fig. 1) are all relied on as further evidence that the art is replete with, and it was notoriously conventional to provide, anti-drip devices for frozen treats, including anti-drip devices with upstanding lips like Ackalusky and applicant's, which lips or upstanding walls help to retain the drippings (which is, of course, applicant's reason for providing upstanding

walls). Note, for example, that Taylor, like Ackalusky, and applicant, discloses a frozen treat drip collecting apparatus that has a (highly) absorbent upper material (8) and a non absorbent lower material (9). Pagnini discloses the drip collecting apparatus can be blotting paper, Rizzuto discloses the drip collecting apparatus can be liquid absorbing, webbed paper, and can be laminated to prevent bleed through and Smith discloses the drip collecting apparatus can be absorbent as well. Claim 1 arguably differs from Acalusky in the recitation that the outer edge of the top layer is "adjacent" to the lip (i.e., how close is "adjacent"?). Ackalusky does not appear to disclose the extent of the top absorbing layer, other than to show it in the figures. Ackalusky provides the top absorbing layer for the same reason applicant employs the layer, and that is to absorb the drippings. Therefore, since Ackalusky is employing the top layer for its art recognized and applicant's intended function, the extent of the top layer, or its dimensions, if you will, is seen to have been an obvious matter of degree and an obvious result effective variable, routinely determinable, and an obvious optimization, at best; based on such variables as the degree of absorbency of the top absorbing layer material (which is a function of the absorbent properties of the material itself, its thickness, etc.). In any case, Taylor can be relied on as further evidence to show it was a well known to extend the absorbent material as a top layer (8) substantially over the lower support layer (6) of a drip guard for a frozen treat. Also, Goodwin, Miller, Rhodes et al, and Hansen et al can be relied on as further evidence to disclose it was well established in the art to configure a moisture absorbent top layer to extend to adjacent the lip or upturned walls of a bottom layer or tray structure (which is what the claims

recite). To modify Ackalusky and extend the top absorbent layer adjacent to the lip (or upturned wall) of the base would therefore have been obvious for the reasons given above. It is noted that although Goodwin, Miller, Rhodes et al, and Hansen et al are primarily directed to collecting drips in meat trays, Goodwin, Miller, Rhodes et al, and Hansen et al are all analogous art since they are all directed to the same generic problem that Ackalusky and applicant are concerned with; i.e., catching and retaining drippings in an enclosure which includes a base for support, sidewalls or lips, and an absorbent material positioned in or on the base. Since Ackalusky already discloses the same source for the drippings as disclosed and claimed by applicant, it is not necessary for Goodwin, Miller, Rhodes et al, and Hansen to also disclose the same source for the drippings for the rejection to be proper. In regard to claim 2 Ackalusky discloses it was well established to employ plastic as the bottom layer and in regard to claim 3, Taylor discloses that it was well established to employ paper as the absorbent material; paper, of course, in various forms, being a notoriously conventional absorbent material. Claims 8 and 13 are rejected for the reasons given above. In regard to claim 17, Ackalusky is silent as to whether the cover/absorbent is laminated. Presumably, this means to the base. In any case, Taylor discloses it was conventional to laminate an absorbent to an underlying layer and to modify Ackalusky and laminate or bond the absorbent material to the underlying layer would therefore have been an obvious result effective variable, routinely determinable, and based on such obvious factors as to the degree of stability desired between the absorbent and base. In regard to claim 18, Ackalusky and the art taken as a whole teach inserting a stick of a conventional frozen treat through the

opening in the cover and base. Employing Taylor as the primary reference, since Taylor discloses a drip collector for a frozen treat comprising an inner or upper absorbing layer and an outer or lower non-absorbing layer adhered thereto, to modify Taylor and employ more or less rigid conventional materials of construction and to provide more conspicuous lips or rims would have been an obvious matter of choice and/or design in view of Ackalusky as further evidenced by Perkins (2003/0087011), Pagnini (3,306,512), Blant (GB2293751), Rizzuto (4,938,411), Oshio (2002/0029697), Suzuya Shokuhin (JP 11-137179), Smith (5,770,250), Goodwin (4,756,939), Miller (4,321,997), Rhodes et al (4,940,621), and Hansen et al (4,865,855), for the reasons given above.

Claims 4-7, 9-12,14,15,16,19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable in view of the references applied above, further in view of Huffer et al (6,457,585), Penick et al (4,336,664), Freedman et al (2,585,924), Lipper (6,814,234), Moravick et al (3,704,892), Shin (4,648,548), Knoerzer et al (6,746,743), Gottschalk (3,835,564), Goldstein (3,100,642), Witkowski et al (5,676,401), McClung et al (6,755,711), and Bellet (2,711,541).

Claims 4-7 differ from the drip collecting apparatus of the combination of Ackalusky (2,803,550) in view of Taylor (2,735,778) or vice versa, both further in view of the art taken as a whole, as applied in the rejection of claims 1-3,8,13,17 and 18 above, in the recitation that an adhesive sticker, a washable tattoo, a partition in the base or a mark is associated with the base, respectively. As evidenced by Huffer et al, Penick et al, Freedman et al, Lipper, Moravick et al, Shin, Knoerzer et al, Gottshalk, Goldstein,

Witkowski et al, McClung et al and Bellet, it was notoriously conventional to provide an article or structure that is to be associated with a product (such as a package that is to be associated with contents) with adhesive stickers, or washable tattoos, or partitions in the article such as the package (e.g., to allow for separation of an article of interest), or a mark. These references all teach providing an article or structure that has a primary function (e.g., as a container) with structure that imparts a secondary function to at least part of the article or structure (e.g., a sticker). For example, Huffer et al discloses a container with a removable tattoo (fig. 2 and 3), Penick et al discloses a container with a puzzle in the wall (abstract), Freedman et al discloses a container with a game, Lipper discloses a container with removable tattoo (fig. 1), Moravick et al discloses a container with a puzzle (fig. 1 and 2), Shin discloses ornaments which are delineated and removed from the wall of a container (abstract), Knoerzer et al discloses a container with an associated sticker (abstract), Gottshalk discloses a container with an associated decal (abstract), Goldstein discloses a carton with a game (fig. 1-3), Witkowski et al discloses a container with a removable tattoo (abstract), McClung et al discloses a box with cut-outs to play a game (abstract) and Bellet discloses a container with a cut-out that becomes a mask. Thus, the art is replete with examples of articles are structures such as receptacles or confining structures which are configured to provide a dual function or multi-purpose such as its primary function and then a secondary function such as an amusement, game or advertising device. Since the art taken as a whole already teaches that it was known to provide drip collecting devices with advertising or display properties (e.g., Pagnini and Blant), thus imparting to the drip collecting

apparatus a multi-purpose or dual function, and it was notoriously conventional to provide articles or structures with a dual function or multi-purpose, to modify the combination, i.e., Ackalusky (2,803,550) in view of Taylor (2,735,778) or vice versa, both further in view of the art taken as a whole as applied to claim 1 above, and provide the drip collection apparatus combination with the various recited conventional elements for their art recognized and applicants intended function would therefore have been obvious in view of the art taken as a whole including Huffer et al, Penick et al, Freedman et al, Lipper, Moravick et al, Shin, Knoerzer et al, Gottshalk, Goldstein, Witkowski et al, McClung et al and Bellet. Claims 9-12, 14 and 15 are rejected for the reasons given above in regard to claims 4-7. In regard to claims 9,10,11, and 12, the particular layer that the elements recited (such as the sticker or partition) are attached to, or associated with, is seen to have been an obvious matter of choice. Claims 19 and 20 recite that the cover is removed from the base and the base is used as a disk. The art taken as a whole discloses that the cover can be laminated or the cover element can be positioned on the base (such as in the teaching in Ackalusky). Whether one removes the cover and what one does with the base after removal of the cover is seen to have been an obvious matter of choice or design; especially since the art taken as a whole teaches converting articles of one utility such as packages into articles of other utility such as entertainment or amusement devices. Note, too, it was well established to associate drip catching absorbent layers with tray type structures either by bonding or just a loose attachment as is done, for example, with meat trays, as shown e.g., by Goodwin, Miller, Rhodes et al, and Hansen et al.

(10) Response to Argument

All of applicant's remarks have been fully and carefully considered but are not found to be convincing for the reasons given above. It is noted that the rejection of claims 4-7, 9-12,14,15,16,19 and 20 is a perfectly proper rejection. Patentability is predicated on what the art taken as a whole teaches. Also, the secondary reference can teach both the "problem", if you will, and the solution. The teaching to combine can be all in the secondary reference. All of the features recited in the claims are conventionally known in the art for applicant's intended function, and the art taken as a whole teaches that these conventional recited features can be associated with conventional diverse articles such as packages for association with various contents to provide a structure with a dual role or function. The references applied against claims 4-7, 9-12,14,15,16,19 and 20 are seen to be generic teachings, fairly teaching one of ordinary skill in the art that one could provide structures such as tattoos or stickers to any structure one chooses. To apply these conventional features to another conventional article such as a drip catching structure would have been unequivocally obvious.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Steve Weinstein/

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